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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 540

WES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, *Petitioner*,

v.

NATIONAL MEDIATION BOARD; LEVERETT EDWARDS, Individually and as Chairman of the National Mediation Board; FRANCIS A. O'NEILL, JR., Individually and as Member of the National Mediation Board; ROBERT O. BOYD, Individually and as Member of the National Mediation Board; WESTERN AIR LINES, INC., Intervenor; SECOND OFFICERS' ASSOCIATION, Intervenor, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT SECOND OFFICERS' ASSOCIATION IN OPPOSITION

TIM L. BORNSTEIN
1741 DeSales Street, N. W.
Washington 6, D. C.

ROBERT R. RISSMAN
257 S. Spring Street
Los Angeles 12, California

Attorneys for Respondent Second Officers' Association

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

Page

QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 2

ARGUMENT 6

I. This case is not one of "imperative public importance" and does not "require immediate settlement in this Court" within the meaning of Rule 20 6

II. The District Court considered Petitioner's claim and correctly applied principles established by this Court 8

CONCLUSION 11

CITATIONS

CASES:

Accardi v. Shaughnessy, 347 U.S. 260 9

Flight Engineers International Association, WES Chapter v. Western Air Lines, — F.Supp. —, 48 LRRM 2487 (S.D. Calif. 1961) 2

Leedom v. Kyne, 358 U.S. 184 ..... 9, 10

Quirin, Ex Parte, 317 U.S. 1 6

Switchmen's Union v. National Mediation Board, 320 U.S. 297 ..... 7, 9, 10

UNA Chapter, Flight Engineers International Association v. National Mediation Board, et al., No. 531 (October Term, 1961) 7

Youngstown Co. v. Sawyer, 343 U.S. 579 6

MISCELLANEOUS:

Presidential Executive Order 10921, 26 Fed. Reg. 1553 3

Presidential Executive Order 10922, 26 Fed. Reg. 1655 3

Railway Labor Act, 45 U.S.C. Sec. 151 *et seq.*, Section 2, Fourth, Ninth, and Tenth 3, 10

Revised Rules of the Supreme Court of the United States, Rule 20 ..... 5, 6

Rules and Regulations of the National Mediation Board, Rule 6, 29 C.F.R. Sec. 1206.6 ..... 4, 8, 9

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QUESTIONS PRESENTED

1. Whether the District Court erred in dismissing Petitioner's complaint which alleged that the National Mediation Board had incorrectly interpreted one of its own rules?

2. Whether the District Court erred in dismissing Petitioner's complaint which alleged that the National Mediation Board had denied it due process of law by failing to exercise powers of compulsory process which the Congress has not granted the Board to exercise?

STATEMENT OF THE CASE

On February 17, 1961, flight engineers employed by Western Air Lines "walked off" their jobs. On the same day, flight engineers represented by the same international union also "walked off" their jobs with six other air lines. As Petitioner itself suggests, these simultaneous, nation-wide walk-outs were in protest of a recent decision of the National Mediation Board (Pet. for Cert. 4).

The facts which gave birth to this litigation are succinctly stated in a decision by District Judge Hall of the Southern District of California in a related case, *Flight Engineers International Association, West Chapter, AFL-CIO* v. *Western Air Lines*, — F.Supp. —, 48 LRRM 2487 (S. D. Cal. 1961).

> "On February 17, 1961, the flight engineers who were employed by Western Air Lines failed to show up for work. The Union says there was no Union sponsored strike. If there was no strike, the court is compelled to the conclusion that the flight engineers individually each of them simply quit their jobs.
>
> "In this connection the following fact is important: On February 18, 1961, the Company requested each flight engineer individually to return to work, and each refused, although in the meantime a lawful injunction had been secured enjoining the strike, and the Company thereupon terminated all of the flight engineers who had refused to show up for work on the payroll."

After the events described above, the President appointed a fact-finding commission to study the nationwide dispute between the Flight Engineers International Association and various air lines on February 21, which excluded Western Air Lines. Executive Order 10921, 26 Fed. Reg. 1553. Two days later, on February 23rd, this Executive Order was amended to include Western Air Lines. Executive Order 10922, 26 Fed. Reg. 1655.

On April 5, 1961, the Second Officers' Association, a labor organization, filed a petition with the National Mediation Board to represent the flight engineers of Western Air Lines. Petitioner's response to this application was an assertion to the National Mediation Board, "upon information and belief," that the Second Officers' Association (SOA) was illegally assisted in violation of the Railway Labor Act.[1] As the Executive Secretary of the National Mediation Board stated in his affidavit to the District Court, "(c)harges of this nature should have been taken by [Petitioner] to the United States District Attorney for prosecution, and not to the National Mediation Board."[2] because illegal assistance by a carrier is a criminal violation of the Railway Labor Act, Section 2, Fourth and Tenth, 45 U.S.C. Sec. 2, Fourth and Tenth. Even though not required to do so, the Board granted a hearing on Petitioner's charges against SOA. At the hearing, two officers of SOA voluntarily appeared and submitted

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[1] Affidavit of Eugene C. Thompson, Executive Secretary of the National Mediation Board, p. 1, para. 3, August 10, 1961, filed in support of Defendants' Motion for Summary Judgment in the District Court.

[2] Ibid, p. 2, para. 3.

themselves to examination by Petitioner's counsel. Petitioner, not satisfied with the voluntary appearance of some SOA officers at the hearing, demanded that other officers of SOA and officers of Western Air Lines also submit themselves for examination. The Board advised Petitioner that the Railway Labor Act did not confer subpoena power on the Board and that it could not require the attendance of witnesses or the production of documents demanded by Petitioner.

Following this hearing, the Board issued its "Findings Upon Investigation" in which it reached these conclusions as to Petitioner's charges against SOA (Pet. for Cert., Appendix C, p. 28):

> "The Board has carefully reviewed the transcript of the hearing and has also examined photostatic copies of the minutes of the several meetings of The Second Officers' Association, as well as a copy of their proposed Constitution and By-Laws. It is not necessary here to review the testimony presented at the hearing. It is sufficient to say that no fact was established from which even an inference—to say nothing of a conclusion — can be drawn supporting either of the charges made by FEIA."

Concluding that SOA's application for an election was valid, the National Mediation Board proceeded to prepare an eligibility list for a mail ballot election among the flight engineering personnel of Western Air Lines. Petitioner contended that the former Western flight engineers, who had participated in the February 17th "walkout," were entitled to vote in this election on the grounds that they were "dismissed" employees whose requests for reinstatement are "pending before proper authorities . . ." within the meaning of Rule 6, 29 C.F.R. Sec. 1206.6, of the National

Mediation Board. Counsel for all parties submitted memoranda to the Board on this question, discussing the legal and factual issues at length and in great detail. On July 20, the Board ruled against Petitioner's eligibility contentions and directed that the election, which Petitioner had succeeded in delaying for several months, be conducted "forthwith" (Pet. for Cert., Appendix D, p. 29).

Petitioner then instituted this action in the U. S. District Court for the District of Columbia to enjoin the election. A temporary restraining order was granted on August 3, 1961. Upon its expiration, Petitioner applied for a preliminary injunction which was denied on August 17. Defendants' motion for summary judgment was thereafter granted on October 18 on the ground that the complaint failed to state a claim on which relief could be granted (Pet. for Cert., Appendix A, p. 15). Petitioner's cross-motion for a summary judgment was simultaneously denied, and the complaint was dismissed.

On September 1, 1961, the Board counted the ballots in the election. Respondent SOA won this election by a substantial majority over Petitioner and was formally certified as the bargaining agent for Western's flight engineers.

After dismissal of the complant, Petitioner filed a notice of appeal with the United States Court of Appeals for the District of Columbia Circuit. Before any proceedings were had in the Court of Appeals, however, Petitioner moved to have the record certified to this Court for the purpose of presenting its Petition for Certiorari under Rule 20 of the rules of this Court.

ARGUMENT

I. THIS CASE IS NOT ONE OF "IMPERATIVE PUBLIC IMPORTANCE" AND DOES NOT "REQUIRE IMMEDIATE SETTLEMENT IN THIS COURT" WITHIN THE MEANING OF RULE 20.

By-passing the Court of Appeals for the District of Columbia Circuit, Petitioner has filed its petition for certiorari in this Court under Rule 20. Rule 20 provides that such petitions will be granted "only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court."

Admittedly, this case may be important to Petitioner, but all litigants regard their own actions with a subjective anxiety which may not be shared by impartial observers. The petition simply does not show why this case is one of "imperative public importance" or why "normal appellate processes" must be circumvented. Indeed, Petitioner does not even contend that this case is one of "imperative public importance" within the meaning of Rule 20. Petitioner merely contends that (Pet. for Cert. 8):

> "This case, together with the *UNA Chapter* case, supra, presents issues of great importance to the proper enforcement of the Act and to administrative law generally. . . ."

It is not contended that drastic and irrevocable consequences depend upon the outcome of this case, as in *Ex parte Quirin*, 317 U.S. 1, or that far-reaching constitutional and economic consequences inhere in this case, as in *Youngstown Co.* v. *Sawyer*, 343 U.S. 579. This case concerns only one election among approximately 100 employees of a single employer. Elections of this kind are conducted by the National

Mediation Board and the National Labor Relations Board every day. In most elections of this type, there are disputes between the parties over eligibility issues, which Petitioner maintains is its "prime claim" here (Pet. for Cert. 8). In short, this is a routine case of agency action in a disputed election situation, one of hundreds decided by federal labor agencies each year.

Under the Railway Labor Act, there is no provision for judicial review of the agency's eligibility rulings in election cases because Congress prescribed that there "was to be no dragging out of the controversy into other tribunals of law." *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297. Faithful to this Congressional prescription, the District Court concluded that Petitioner's complaint failed to state a claim on which relief could be granted. In the circumstances of this case, therefore, there plainly is no justification for circumventing normal appellate procedures.

Petitioner's desire to have the instant case considered with *UNA Chapter, Flight Engineers International Association* v. *National Mediation Board*, No. 531, involving a "craft or class" determination by the Board, is legally inexplicable. The factual and legal issues in these two cases are different, and the actions are unrelated. Assuming, *arguendo*, that these cases raise substantially the same issues, how can Petitioner assert that this case is one of "imperative public importance," justifying circumvention of the Court of Appeals, where no such contention was advanced on behalf of the *UNA Chapter* case? The *UNA Chapter* case followed normal appellate procedures.

Although Petitioner's convenience might be served by circumventing the Court of Appeals, there is no

other apparent justification for allowing this direct appeal.

II. THE DISTRICT COURT CONSIDERED PETITIONER'S CLAIM AND CORRECTLY APPLIED PRINCIPLES ESTABLISHED BY THIS COURT.

Petitioner's "prime claim" is that the Board incorrectly interpreted its own rules in determining that the former flight engineers of Western Air Lines were not entitled to participate in this election. Rule 6, the rule in question, provides that:

> "Dismissed employees whose requests for reinstatement [on] account of wrongful dismissal are pending before proper authorities . . . are eligible to participate in elections. . . ."

Based on the facts before it and the written memoranda of the parties, the Board concluded that these employees were not entitled to participate in this election. Although the Board's order did not set forth its reasoning, it is plainly supportable on the basis of the facts.

Petitioner argued to the Board that the right of these former employees to reinstatement was "pending before proper authorities" so as to entitle them to vote. Respondent SOA argued to the Board that for many reasons the claims of these former employees were not properly pending before any "proper" authority within the meaning of Rule 6. The Board could have found that these claims for reinstatement were not properly pending before "proper authorities" within the meaning of Rule 6.[3]

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[3] See Brief for Respondent Western Air Lines, Inc., In Opposition, pp. 12-13, footnote #8, where six distinct grounds are set forth to show that requests for reinstatement were not properly pending before any "proper authority."

Petitioner also argued that these former employees were "dismissed employees" within the meaning of Rule 6. Respondent SOA argued that they had "simply quit," as Judge Hall of the U.S. District Court for the Southern District of California had found. The Board could also have found that Rule 6 was inapplicable because these employees had "simply quit."

On the basis of these contentions, *inter alia*, the Board ruled against Petitioner. This is not, therefore, a case in which the agency has violated a Congressional mandate, as in *Leedom* v. *Kyne*, 358 U.S. 184, or where an agency has refused to follow its own procedural rules, as in *Accardi* v. *Shaughnessy*, 347 U.S. 260. This is the garden variety kind of administrative proceeding in which an agency, interpreting its own rules in a rational manner, has ruled against the arguable contentions of a party. Such routine agency decisions are simply foreclosed from judicial review, *Switchmen's Union* v. *National Mediation Board*, *supra*, for otherwise the federal courts would be flooded with litigation to review arguable interpretations of agency rules and regulations.

Petitioner's assertion that the "primary issue presented" is "whether the District Court has power to adjudicate a claim and grant relief in Board representation cases under any circumstances" is an extraordinary exaggeration of the substantive issues in this case (Pet. for Cert. 3, footnote #1). If the Court should decide to review this case, it would merely be called upon to determine whether the Board's interpretation of its own rule was reasonable, not whether there are "any circumstances" under which the District Courts should review decisions of the Board. *Leedom* v. *Kyne*, *supra*, clearly reveals the circum-

stances under which the District Courts may review otherwise unreviewable agency actions, and *Switchmen's Union* v. *National Mediation Board*, *supra*, clearly reveals the circumstances under which the District Courts may not review agency actions. Petitioner's assertion is that this case is more like the *Leedom* case. The record shows that it is clearly within the holding of *Switchmen's Union*. There are no new or undecided issues of administrative law presented by this case.

Petitioner's second contention is that the Board's refusal to require the production of certain named witnesses and documents in the hearing on Petitioner's charges against SOA was a denial of due process. The Board has no subpoena powers. Charges of illegal assistance to a labor organization by a carrier should properly be referred to the United States Attorney to be criminally prosecuted. Several officers of SOA voluntarily submitted themselves to examination by Petitioner's attorneys. Although it was not required to do so under Section 2, Ninth, of the Railway Labor Act, the Board granted Petitioner a full hearing to present such evidence as it chose to present. Finding insufficient evidence in this hearing to support even an "inference" that SOA had been illegally assisted, the Board concluded that SOA's application for an election was entitled to be entertained.

Petitioner's argument, reduced to its essence, is that the Board denied it due process by refusing to exercise powers which Congress has not authorized the Board to exercise. This is a novel due process argument. Describing the Board's statutory powers in *Switchmen's Union*, this Court observed that Congress gave the Board only the functions of a "referee," but "no

enforcement functions." At 304 of 320 U.S. If there is a lack of wisdom in Congress' statutory regulation of labor relations in this industry, neither the Board nor the courts can substitute their judgment for that of Congress. Congress' asserted lack of wisdom, however, has not heretofore been regarded as a deprivation of due process.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

TIM L. BORNSTEIN
1741 DeSales Street, N. W.
Washington 6, D. C.

ROBERT R. RISSMAN
257 S. Spring Street
Los Angeles 12, California

Attorneys for Respondent
Second Officers'
Association